questionable act of bankruptcy under section 3(1)(e) of the Bankruptcy Ordinance. Further, regard must be had to the position of the debtor, the possibility of his getting over his difficulties, and the interests of the public. According to his statement of affairs, which he took a very long time to file, the debtor's liabilities amounted to $297,950.02 at the date of the receiving order made against him, and his assets amounted to $21,500. To my mind he is hopelessly insolvent. It is clearly contrary to the interests of the public that the receiving and adjudication orders made against the debtor should be rescinded and annulled and that he should thereby be enabled to go on trading.

I must add, however, with all due respect to the learned Chief Justice, that, although I agree with him that the adjudication order in *Re Yap E. Boon* was bad in law, I do not agree that it was void *ab initio* and that it was a nullity. The distinction between the case of *Re Yap E. Boon* and the present case is this. In *Re Yap E. Boon*, the adjudication order being bad in law *ab initio*, the circumstances were such that it had to be annulled and, therefore, the Court must be regarded as having exercised its discretion in favour of the applicant, although the Court said it had no discretion to refuse to set aside the adjudication order. In the present case, the adjudication order was properly made in the first instance, but facts established later satisfied the Court that the adjudication order ought not to have been made, and the Court, having considered the circumstances of the case, decided that it ought not to annul the bankruptcy, and refused to exercise its discretion in favour of the applicant.

Before I conclude, I must deal with a criticism made by counsel for the debtor of the following passage in the judgment of the learned Chief Justice:

> "So also in this case, even if the Sheriff's return was incorrect, nevertheless if the petitioning creditor honestly believed on reasonable grounds (that is to say on the faith of the Sheriff's return) that the debtor had no property liable to seizure, the adjudication was initially good."

He submitted that the petitioning creditor's belief had nothing to do with the matter. Here it must be pointed out that the learned Chief Justice was comparing the present case with *Re Dunn*, where Denning, L.J., (as he then was) said:

> "Even if the debt was unenforceable, nevertheless if the debtor honestly believed on reasonable grounds that he was unable to pay his debts the adjudication was good and should not be annulled *ab initio*."

This was an answer to the official receiver's contention that the debtor's petition was an abuse of process of the Court and that, therefore, the adjudication order ought to be annulled on the ground that it ought not to have been made The learned Chief Justice's remarks were, similarly, an answer to the contention of counsel for the debtor that it was an abuse of process of the Court to found a bankruptcy petition on a Sheriff's *nulla bona* return which was subsequently proved to be incorrect.

For the above reasons, I come to the conclusion that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *de Souza & Christopher; Allen & Gledhill.*

PHAN POW v. TUCK LEE MINING & CO.

[O.C.J. (Ong J.) October 27, 1958]

[K.L. — Civil Suit No. 276 of 1958]

Practice and Procedure — Leave to pay amount of Judgment by instalments — R.S.C. 1957, O. 42 r. 17 and O. 72 r.2 — Want of Jurisdiction — Present practice.

In this case the plaintiff Phan Pow, a mine foreman, obtained judgment on July 30, 1958 against the defendants, his former employers, for the sum of $3,892.12 inclusive of costs. The writ was duly served on all 10 partners in the defendant firm.

On August 26, 1958 the defendants filed a notice of motion applying for an order that they be given leave to pay the amount of the judgment by instalments of not less than $150 per month with effect from September 1, 1958. It was supported by an affidavit of the defendants' managing partner setting out the grounds of their inability to pay, purportedly complying with the provisions of the English R.S.C., O.42 r.19. Their object was to seek a stay of execution. The plaintiff subsequently on 18th September applied for execution, but the writ of seizure and sale was not issued pending the disposal of the defendants' application.

At the hearing plaintiff's counsel opposed the application on the ground that in the Federation Rules of the Supreme Court 1957, there was no r.19 under Order 42, and in the absence of such rule, the Court had no jurisdiction to make any order on this application.

Held: (1) an order for payment by instalments is only a form of stay of execution in the case of a decree for payment of money, and the repeal of the Civil Procedure Code together with the absence of r.19, do not effect the jurisdiction of the Court, in a proper case, to Order a stay for such time and subject to such terms as it may in its discretion think fit;

(2) under Order 72 r.2 it is permissible to call in aid the provisions of the present English Order 42 r.19, which in fact does not conflict with the practice heretofore followed in Malaya in making an order for stay of execution upon granting leave to pay by instalments.

Case referred to:—

(1) *Jacobs v. Brett* (1875), L.R. 20 Eq. 1.

MOTION.

Robert K. C. Hoh for the plaintiff.

W. D. Bewsher for the defendants.

Cur. Adv. Vult.

Ong J.: — In this suit the plaintiff, a mine foreman, obtained judgment on 30th July, 1958 against the defendants, his former employers, for the sum of $3,892.12 inclusive of costs. The writ had been duly served on all 10 partners in the defendant firm.

On 26th August, 1958 the defendants filed a notice of motion applying for an order that they be given leave to pay the amount of the judgment by instalments of not less than $150 per month with effect from 1st September, 1958. It was supported by an affidavit of the defendants' managing partner setting out the grounds of their inability to pay, purportedly complying with the provisions of the English Rules of the Supreme Court, Order 42, rule 19 (see Annual Practice, 1958). Their object, of course, was to seek a stay of execution. The plaintiff subsequently on 18th September applied for execution, but the writ of seizure and sale was not issued pending the disposal of the defendants' application.

At the hearing plaintiff's counsel opposed the application on the ground that in our Rules of the Supreme Court 1957, there was no Rule 19 under Order 42, and in the absence of such rule, the Court had no jurisdiction to make any order on this application.

Order 42, rule 19, which does not appear in our Rules of the Supreme Court, reads as follows:

"19. — (1) Where a judgment is given or an Order made for the payment of money by any person and the Court or a Judge is satisfied on application made at the time of the judgment or order or at any time thereafter by the judgment debtor or other party liable to execution that there are special circumstances which render it inexpedient to enforce the judgment or order or that the judgment debtor is unable from any cause to pay the money, then, notwithstanding anything in rule 17, 17A or 18 of this Order, the Court or Judge may by order stay execution of the judgment or order by writ of *fieri facias* either absolutely or for such period and subject to such conditions as the Court or Judge thinks fit.

(2) An application under this rule if not made at the time the judgment is given or the order made shall be made by summons and may be so made notwithstanding that an appearance has not been entered.

(3) An application made by summons shall be supported by an affidavit made by or on behaf of the applicant which shall state the grounds of the application and the facts necessary to substantiate them and, in particular, shall, in the case of an application on the grounds of the applicant's inability to pay, disclose his income, the nature and value of any property of his and the amount of any other liabilities of his.

(4) A summons under this rule and a copy of the affidavit in support shall be served not less than four clear days before the return day on the party entitled to enforce the judgment or order or his solicitor and may, without prejudice to any other mode of service, be so served by ordinary pre-paid post.

Any document served by post under this paragraph shall be deemed to have been served at the time at which it would have been delivered in the ordinary course of post.

(5) Any order staying execution under this rule may be varied or revoked by a subsequent order."

It seems to me, in the first place, that the absence of Rule 19 must be considered in the light of our Rule 17 where it differed from its English counterpart as it appears in the Annual Practice, 1958. In paragraph (b) to our Rule 17 "the Court or a Judge may, at any time after the time of giving judgment, or making the order, stay execution until such time as it or he thinks fit." It may be said, therefore, that there is not entirely a *lacuna* due to the deletion of Rule 19, resulting in the complete absence of any provision in our Rules providing for a stay of execution.

As to payment by instalments, in the former Civil Procedure Code (Cap.7), which was repealed on 1st April, 1958 (*vide* L.N. 81/58) by the Civil Procedure Codes (Repeal) Ordinance, 1957 when the Rules of the Supreme Court came into force, there was express provision by section 227 that "where and in so far as a decree is for the payment of money, the Court may at any time and for any sufficient reason, notwithstanding anything contained in the contract (if any) under which the money is payable, order that payment of the amount decreed shall be postponed or made by instalments on such terms as to the payment of interest, the attaching of the property of the judgment-debtor, or the taking of security from him or otherwise as the Court thinks fit."

An order for payment by instalments is only a form of stay of execution in the case of a decree for payment of money, and the repeal of the Civil Procedure Code together with the absence of Rule 19, do not, in my opinion, affect the jurisdiction of the Court, in a proper case, to order a stay for such time and subject to such terms as it may in its discretion think fit. As Jessel M.R. said in *Jacobs v. Brett*[1]:

"I think nothing is better settled than that an Act of Parliament which takes away the jurisdiction

of a superior Court of Law must be expressed in clear terms. I do not mean to say that it may not be done by necessary implication as well as by express words, but at all events it must be done clearly. It is not to be assumed that the Legislature intends to destroy the jurisdiction of a superior Court. You must find the intention not merely implied, but necessarily implied."

In the second place, O. 72 r.2 provides that —

" Where no other provision is made by any written law or these Rules, the present procedure and practice in England or in Malaya remain in force."

It is at least permissible to call in aid the provisions of the present English Order 42 rule 19, which in fact does not conflict with the practice heretofore followed in Malaya in making an order for stay of execution upon granting leave to pay by instalments.

In the present case the defendants have set out in the affidavit of their managing partner special circumstances of hardship which render it inexpedient to enforce the judgment forthwith. Their difficulties have arisen largely by reason of the tin restriction scheme, which has had immediate detrimental effects on the tin industry, but in the long run, and before long, when the scheme gets into proper working order, its beneficial effects on tin miners may well prove its worth. The defendants have offered to increase the amount of monthly instalments to $300. They have also made full disclosure of the firm's assets and liabilities, and that other judgment creditors have stayed their hands. There is no very serious danger of the plaintiff losing the fruits of his judgment, or any likelihood of his being better off if the defendants should be forced into bankruptcy. Finally, if there is any material change in the circumstances, the plaintiff may at any time apply to Court for variation or rescission of the order.

For the above reasons, I will give the defendants leave to pay the amount of the judgment by monthly instalments of $300 with effect from 1st September, 1958, and thereafter on or before the 1st day of each succeeding month; in the event of default in payment of any instalment by the due date, execution to issue for the whole balance then outstanding. Costs of this application to the defendants assessed at $100. The defendants will have liberty to apply.

Order accordingly.

Solicitors: *Eugene Lye & Hoh; Bannon & Bailey.*

KHO TENG HOOI v. THE BRITISH INDIA GENERAL INSURANCE CO. LTD.

[O.C.J. (Ong J.) November 7, 1958]

[K.L. — Civil Suit No. 322 of 1957]

Damages — Fatal Accident — Insurance Policy — Clauses in — " Whilst under the influence of intoxicating liquor or drugs."

This was a suit by the administrator of the estate of one Khoo Teng Oon, deceased, who died in a road accident while driving his motor-car along Treacher Road, Kuala Lumpur, on the night of 24th June, 1956. The defendant is the Insurance Company with whom the car was insured, and the claim was firstly for the value of the motor-car which was a total wreck, and secondly, upon an endorsement to the Policy pertaining to what is called "Increased Private Car Benefits", whereby the Insurers undertook to pay compensation to the insured or his personal representative for bodily injury sustained by the insured whilst using his said motor-car. The agreed value of the motor-car was $4,550 and the amount of compensation payable upon the death of the insured was $10,000. There was no dispute as to the quantum, in the event of judgment being given for the plaintiff.

The defendant repudiated liability on the ground that at the time of the accident the deceased was driving his motor-car whilst under the influence of intoxicating liquor.

The relevant clauses in the policy were as follows:

(a) " The Company shall not be liable to make any payment in respect of loss or damage arising whilst such motor-car is being driven by the insured..... whilst under the influence of intoxicating liquor or drugs";

(b) " No compensation shall be payable in respect of death or injury directly or indirectly wholly or in part arising or resulting from or traceable to.....an accident happening whilst the insured is under the influence of intoxicating liquor or drugs."

Held: on the evidence the deceased was in a state of pronounced intoxication and the claim was accordingly dismissed.

Cases referred to:—

(1) *Breithaupt v. Abram,* (1957) 352 U.S. 48.

(2) *Mair v. Railway Passengers Assurance Co. Ltd.* (1877) 37 L.T. 356 at p. 358.

CIVIL SUIT for damages.

S. D. K. Peddie for the plaintiff.

R. H. V. Rintoul for the defendant.

Cur. Adv. Vult.

Ong J.: — This is a suit by the administrator of the estate of one Khoo Teng Oon, deceased, who died in a road accident while